IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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NO. 77-1838

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SAVE OUR CEMETERIES, INC., ET AL.
PETITIONERS

VERSUS

THE ARCHDIOCESE OF NEW ORLEANS, INC., ET AL.
RESPONDENTS

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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"They bury their dead in vaults, above the ground. These vaults have a resemblance to houses - sometimes to temples; are built of marble, generally; are architecturally graceful and shapely; they face the walks and driveways of the cemetary; and when one moves through the midst of a thousand or so of them, and sees their white roofs and gables stretching into the distance on every hand, the phrase 'city of the dead' has all at once a meaning to him."
Mark Twain, Life on the Mississippi

"After 200 years of building a city and a country, empty words rise as homage to history's statesmen, scholars and martyrs, while their bones lay uncovered by vandals, and mixed with debris in slums."
(Excerpt from Exhibit R-2; newspaper article by Mrs. Joyce Davis Robinson, reporter for the New Orleans Times Picayune, November 1, 1975, Section 1, p. 10)

The wall burial vaults of St. Louis No. 2 Cemetery were constructed in 1824 to serve as inexpensive burial places for the poorer black and white population of New Orleans. Through about 1935, the vaults were sold for $50.00 each. Ownership of the vaults has been handed down through families, so that today residents of many states own the sites and have the

right to use these vaults.

However, the future of this unique and irreplacable historic landmark is threatened. Should Your Honors deny this petition, the vaults may well be destroyed.

The controversy presented here involves the owners of the wall vaults and the Archdiocese of New Orleans. The owners assert their right, as the true owners of the vault space, to have the vaults repaired. Indeed, money is being raised for that purpose. However, the Archdiocese of New Orleans and Acme Marble and Granite Company see great potential profit in tearing down the vaults, forcing the owners to rebury their ancestors elsewhere, and constructing a new mausoleum on the site. The details of this arrangement are outlined below.

The Archdiocese owns all of the Catholic cemeteries in New Orleans. The right of burial in the vault space, a property and/or contractual right, is vested in the vault owners. The Archdiocese has consistently refused either to repair the vaults or to permit others to do so. In addition, the Archdiocese has taken certain steps, detailed below, which resulted in first a closure order and then in a demolition order being issued by the City of New Orleans.

This case focuses upon the commitment of the federal courts to preserve historic sites, according to a policy twice declared by Congress, and to afford due process of law to all races and classes. This application seeks to prevent destruction of a landmark unique to New Orleans and unique in America. This application seeks an opportunity for Petitioners to be heard and to apply Rule 1 of the Federal Rules of Civil Procedure which declares the principle: "They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Petitioners Gilbert L. Maury and Save our Cemeteries, Inc., respectfully pray that a writ of certiorari issue to review the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 28, 1978, and that the decision below be reversed.

## Opinion Below

The judgment of the Court of Appeals was rendered with a written opinion on February 28, 1978. Rehearing and Rehearing En Banc were denied on April 17, 1978. The written opinion of the Court of Appeals for the Fifth Circuit is attached in the appendix hereto.

## Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 28,

1978. A timely petition for rehearing and rehearing en banc was denied on April 17, 1978. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1) and 28 U.S.C. Section 2101.

Questions Presented

1. Whether the District Court erred in failing to allow time for discovery before summarily dismissing plaintiff's claim.

2. Whether the District Court erred in failing to grant leave to amend before summarily dismissing plaintiff's claim.

3. Whether the District Court erred in failing to recognize jurisdiction predicated upon the Sherman Act.

4. Whether the District Court erred in failing to recognize jurisdiction predicated upon the Civil Rights Act.

Regulations and Statutory Provisions Involved

15 U.S.C., Sec. 15. **Suits by persons injured; amount of recovery**

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and

the cost of suit, including a reasonable attorney's fee.

15 U.S.C., Sec. 26 **Injunctive relief for private parties; exception**

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . .

16 U.S.C. Sec. 461 **Declaration of national policy**

It is declared that it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit

of the people of the United States.

Aug. 21, 1935, c. 593, Sec. 1, 49 Stat. 666.

**42 U.S.C. Sec. 1981 Equal rights under the law**

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

**42 U.S.C. Sec. 1982 Property Rights of citizens**

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

**42 U.S.C. Sec. 1983 Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or

usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. Sec. 1985(3) **Depriving persons of rights or privileges**

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy

in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

**42 U.S.C. Sec. 4331 Congressional declaration of national environmental policy**

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may--

(1) fulfill the responsibilities of

each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

## Statement of the Case

Petitioners are Mr. Gilbert L. Maury, individually and on behalf of all others similarly situated, to wit: owners of the wall vaults of St. Louis Cemetery No. 2, and Save Our Cemeteries, Inc., a non-profit organization formed for the purpose of preserving for future generations the 155-year old cemetery, now recognized on the National Register of Historic Sites, as well as other of the historic cemeteries of New Orleans. Petitioners brought the action under the provisions of 28 U.S.C. Secs. 1331, 1337, and 1343, 15 U.S.C. Secs. 15 and 26, as well as 42 U.S.C. Sec. 1988.

Over the course of several years, Respondent, Archdiocesan Cemeteries of New Orleans, has followed a consistent scheme aimed at the

destruction of the wall vaults of St. Louis Cemetery No. 2. This is because under Chapter 13, Ordinances of the City of New Orleans, Art. 1, Sec. 13-10, the duty to maintain this cemetery rests on the Archdiocese. However, since at least March of 1974, the respondent and Acme Marble and Granite Co., Inc., have been conspiring to demolish the wall vaults (Exhibits Rome A and Wegmann H), and sell the owners new burial property. Pursuant to this plan, the owners were mailed a form letter advising them that 1) if they purchased a new burial site in an Archdiocesan cemetery, reburial would be free, or 2) they could transfer their ancestor's remains to another cemetery at an undisclosed fee, or 3) have the remains reintered in a common grave without individual monuments (Exhibit M-6 and P-3). Also, representatives from Respondent and/or Acme tried pressuring owners into buying new tombs. Monies collected in this fashion went to Acme (Exhibit R-1). No compensation was offered for the taking of the wall vault property.

Other steps taken included refusing to repair (statement of Mr. Frank Rome in Dec.4, 1974 newspaper article, Exhibits P-3 and Wegmann M & N.) and preventing others from repairing the vaults (Exhibits C-2, TRO Hear-

ing pp 30 and 68-71), obtaining an order in late 1974 from the City of New Orleans preventing future burials (Exhibit R-1), removing guards at the cemetery so that the area is unsafe for visitation by owners, mourners, and tourists, and so that the vaults are subject to vandalism (see Exhibit R-2).

At the same time, the respondents were misleading the owners, and the general public, into thinking that it planned a restoration program and that no demolition was planned (Exhibits P-1, Wegmann I, J, K, and L).

The Archdiocese has contracted with Acme Marble and Granite Co., Inc., as their exclusive agent for sale of Catholic burial property in the greater New Orleans area. As mentioned above, Acme representatives contacted vault owners in connection with buying new tombs and accepted all monies paid for new tombs. The prices charged for such services by Acme are higher than prices charged in other cemeteries. Similarly, the price charged by the Archdiocese for repairs for tombs (as opposed to wall vaults) in St. Louis No. 2 was two to three times higher than that charged by private contractors.

In addition, Your Honors should note that no marble is quarried in Louisiana. Apparently Acme's quarries are in Mississippi and

elsewhere. Thus, interstate commerce is necessarily involved in the transport of marble.

These facts bear most heavily against dismissal and/or summary judgment of petitioners' antitrust claims and denial of petitioners' leave to amend in the courts below, and establish jurisdiction over petitioners' civil rights claims.

In the late summer of 1976, the Archdiocese took the especially serious step of issuing a complaint, through its attorneys, to the New Orleans Department of Safety and Permits (Exhibit Robin 1). This department, relying on Respondents' representations that the wall vaults were in imminent danger of collapsing, issued an order to repair or demolish the walls by September 3, 1976 (Exhibit Robin 3). To prevent the destruction of the wall vaults, Petitioners filed suit as a class action on August 30, 1976.

Experts who testified in behalf of Petitioners at the TRO Hearing on September 2, 1976 disputed the finding that the walls were in danger of collapse, as well as Respondents' representations to vault owners that the walls and vaults could not be repaired. Dean William Turner of the Tulane School of Architecture testified as to the inherent strength of the massive walls and that they could be sta-

bilized and repaired (TRO Hearing pp 19-20). Mr. E. Sorrell Lanier, a civil structural engineer, testified that based on his inspections of the wall vaults, he had concluded that "the structures are sound" and that "with maintenance and a little bit of work" all the vaults could be renovated and brought back into use (TRO Hearing pp 25, 28, 29-31).

Although the case was assigned to the Hon. Judge Fred J. Cassibry, the Temporary Restraining Order Hearing was held before the Hon. Judge R. Blake West on September 2, 1976. At that hearing, significant evidence, described above, outlining Respondent's conduct directed to destruction of vaults without compensating the owners, and the connection with Acme was presented to the court.

In addition, it was discovered that the City of New Orleans had issued its demolition or repair order based on the representations of the Archdiocese and had not carried out a detailed inspection, as Mr. Lanier had, in order to determine whether the structure was sound. Mr. Frank Robin, Chief Inspector of the City of New Orleans Department of Safety and Permits testified as to the procedures followed in reference to Respondents' complaint. His testimony shows that the department followed standard procedures. Based on

this evidence, Petitioners voluntarily dismissed the City of New Orleans as a defendant without prejudice.

The manipulation of the situation by Respondents, outlined above, and the statement by Mr. William Barlow, Chief of Institutional and Premises Sanitation Division of the Louisiana Department of Health to the Times-Picayune that at the request of the Archdiocese, the Health Department had not inspected St. Louis Cemeteries Nos. 1 and 3 further suggests calculated use and control of state agencies to deprive Petitioner's class of their property and/or contractual rights.

While such evidence may or may not be sufficient to prove Petitioners' allegations at trial, such evidence is sufficient to have granted Petitioners' Motion for Leave to Amend and to deny or at least postpone summary judgment on Petitioners' civil rights and other claims. It is no argument that Petitioner had not yet begun discovery at the time of the hearing before Judge Cassibry six weeks later when, as here, copies of significant testimony and exhibits had been requested but were still unavailable from the Court, despite the diligent efforts of Petitioners to obtain the same and despite Petitioners' Motions to Defer or Postpone until said transcript of testimony

and exhibits were available.

The Court below would have had Petitioners blindly swear to affidavits to contradict those of Respondents, blindly amend their pleadings, and propound interrogatories in a broadside fashion regardless of the facts in the then unavailable record. The fact that this pertinent evidence was unavailable to the parties and the Court at the October 20, 1976 hearing and the fact that Judge West and not Judge Cassibry presided at the TRO Hearing should not be held against Petitioners.

Respondents have within their control and knowledge the method by which they did or would have utilized, to their benefit, the information gained under color of law. Petitioners alleged that they have such information, and that such information was utilized to further the conspiracy.

The information and details of the interstate activities coming within the requisites of the Sherman Act and the efforts used to obtain closure and demolition of wall vaults were exclusively within the control and possession of the defendants. The facts and existence of the "in commerce" or "affecting commerce" activities of Respondents with regard to interstate sales and as to conversations and contracts by Respondents and their

counsel with the City of New Orleans make the requested information inaccessible except through the discovery devices provided by the Federal Rules. Prudent attorneys and good faith litigants do not ab initio allege overt facts concerning effectuation of conspiracies when there was no way in which such information could be garnered except from the co-conspirators themselves and any evidence in the record is unavailable for use.

The wall vault owned by petitioner, Mr. Gilbert L. Maury, is in sound condition and is capable of safe and lawful use for burial. Mr. Maury has requested that he himself should be permitted to utilize his wall vault upon his demise, but has been told by the representatives of the Archdiocesan Respondents that this is impossible under any circumstance because the governmental authorities have closed the vault to burials. In truth and in fact, governmental authorities having supervision of St. Louis Cemetery No. 2 will permit burials in the wall vaults.

Upon information and belief, including newspaper articles and the activities of the Respondents with regard to the foreclosure of burials and the documents obtained from the files of the Archdiocese at the Temporary Restraining Order Hearing, Petitioners alleged

that the Respondents were attempting to deprive the owners of their property and to discriminate against such owners in favor of owners of burial property in other Catholic cemeteries, which, though in part in a similar condition to St. Louis No. 2 has not been threatened with foreclosure to future burials or with actual demolition. Plaintiffs believe that once proper discovery is allowed, the necessary discriminatory animus of Respondents will be revealed.

Petitioners' offer in oral argument in the district court to amend were turned down. Petitioners have in their possession additional facts and can, by discovery, uncover additional facts which will demonstrate the details of the conspiracy and the method by which the fruits thereof were utilized to deprive wall vault owners of their property rights and other civil rights.

The Archdiocese will realize substantial economic benefit from the resale of the space on which the old vaults rested, avoid the expense of repair and maintenance, and of course Acme will be able to sell new tombs. The ones who will lose, if the demolition order is allowed, are the vault owners who stand to be deprived of their property without compensation and without due process of law, and the

public who will lose a unique historic landmark should this writ be denied. For many wall vault owners demolition and non-use means burial in "Potter's Field."

Reasons For Granting The Writ

I. A conflict exists between the United States Court of Appeals for the District of Columbia, Second, Third and Ninth Circuit and the Fifth Circuit as to whether, in complex antitrust cases, full discovery shall be allowed prior to a consideration of a Motion for Summary Judgement in complex antitrust cases.

The Fifth Circuit affirmed the dismissal of Petitioners' complaint prior to even cursory discovery and after the denial of opportunity to amend to allege further facts under circumstances in which the well pleaded-facts were conceded by the Fifth Circuit to demonstrate causes of action under the federal statutes upon which federal jurisdiction was asserted. The discovery inquiries made at the TRO hearing were directed to and sought material and information that was either directly related to the question raised by the pending Motion for Summary Judgment or could easily elicit or lead to admissible evidence on the issues raised by the motion. (4 Moore's Federal Practice, Sec. 26.25[6] (1974) at p. 26-118-26-119). The Federal Rules and

applicable case law dictate that such motions should not even be considered until discovery had been completed in its entirety.

In the instant case, the District Court granted the motion to dismiss when the transcript of the TRO Hearing and the exhibits filed with the Court were unavailable to that Court to aid in its decision. The material which had been discovered could not even be utilized.

The Courts of Appeals have been uniform in permitting full discovery with regard to such crucial matters as the interstate nature of the trade and commerce prior to a consideration of a motion for summary judgment.

In Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551 (2d Cir. 1977). Suit was brought under the Sherman and Clayton Antitrust Acts, 15 U.S.C. Sec. 1 et. seq. and 12 et. seq. The Court stated that appellants had filed their request for documents followed by objections to such requests by the appellees, and before the Court could act on the objections appellees moved for dismissal and summary judgment. Appellants moved that any judgment on appellee's motion to dismiss be delayed until after discovery was completed. The Court denied appellants' motion and dismissed the action or granted

summary judgment.

The court then discussed the allegations of the complaint and the requisites for consideration of a motion for summary judgment and concluded

> ". . .that a motion for summary judgment should not be entertained before discovery has been completed in antitrust cases in which the relevant facts are disputed and intent to injure is a issue. See Hospital Building Co. v. Trustees of Rex Hospital [1976-1 Trade Cases 60,885], 425 U.S. 738,746 (1976) ('in antitrust cases . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly'); Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. 55 F.R.D. 292, 296-97 (S.D.N.Y. 1972);cf. ALW, Inc. v. United Airlines, Inc. 55 F.R.D., 292, 296-97 (S.D. N.Y. 1972); cf ALW, Inc. v. United Airlines, Inc. 510 F. 2d 52, 55 (9th Cir. 1975).

In Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1978) plaintiffs moved for a denial of the motions to dismiss under Rule 56(f), saying that they were unable properly to respond to the motion without an opportunity to conduct discovery concerning the "conspiracy" claim. The District Court granted summary judgment for failure to state a cause of action under Sherman Act 1. The Third Circuit emphasized that the Rule 56(f) motion indicated that the evidence which would support plaintiff's theory of a combination or

conspiracy was, as it usually is, in the hands of defendants. The Court held that summary judgment should not be granted without affording plaintiffs an opportunity for discovery, and that where facts are in possession of the moving party, a continuance of a motion for summary judgment for purposes of discovery should be granted as a matter of course, citing Costlow v. United States, 552 F.2d 560 (3d Cir. 1977).

In Costlow v. United States, 552 F. 2d 560 at 563-564 (3d Cir. 1977), citing Ward v. United States, 471 F. 2d 667, 670-71 (3d Cir. 1973), the Third Circuit reversed the granting of a motion for summary judgment by the district court in language applicable to the present case:

> "But by acting on the motion for summary judgment without argument, and without reference to what might be developed in discovery, which was being diligently pursued, the court erred."
>
> "[We] have said that where the facts are in possession of the moving party a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course."

See also Bresler & Reiner, Inc. v. Holiday Inns, Inc. 73 F.R.D. 684 (E.D. Pa. 1977) [trial by affidavit is no substitute to trial by jury in an antitrust action].

In Moore v. Jas. H. Matthews & Co., 473 F. 2d 328, (9th Cir. 1973), the Ninth Circuit held that the plaintiff's assertion in an antitrust action that the defendant, a private cemetary, serviced severty-two percent of the burials in the county and that the defendant bronze monument makers produced sixty-five percent of the markers made in the United States were adequate to raise a genuine issue of fact and preclude the granting of summary judgment.

See also Anderson v. American Automobile Association 454 F.2d 1240 (9th Cir. 1972); Lima v. Bank of America National Trust & Savings Ass'n., 549 F.2d 597 (9th Cir. 1977); Canadian American Oil Company v. Union Oil Corp. of California, 1978-1 Trade Cases 61,-910, ____F.2d ____ (9th Cir. 1978); Gray v. Greyhound Lines, East 545 F.2d 169 (D.C. Cir. 1976) and Mazaleski v. Treusdell 562 F.2d 701 (D.C. Cir. 1977) as to inappropriateness prior to discovery and on issues on intent.

The evidence in the present case consists of the fact that Acme Marble and Granite is the sole supplier of services for the catholic cemeteries in this area and the exclusive sales agent for the Archdiocese in its plan to sell other catholic cemetary plots to the owners of the St. Louis No. 2 wall vaults.

Accordingly, any of the owners, (including non-residents of Louisiana), who do not already own other burial space and who want to avoid having the remains their loved ones dumped into a common grave, must arrange the purchase of a new plot through Acme Marble and Granite. This, in turn, leads to the necessity for new markers or tombs to be purchased from Acme. The above considerations along with the fact that Louisiana imports all marble is prima facie evidence of an effect on interstate commerce. These facts should not be disregarded, as they were by the court below, simply because petitioners' motion for leave to amend was denied.

Should the Court allow these wall vaults to be destroyed the Archdiocese will be condoned in using tactics, as it is attempting here, to destroy other historic sites which it owns, i.e., other catholic cemeteries in this city. Such action will have the overall effect of discouraging tourist trade, thereby discouraging and affecting interstate commerce. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1968).

Tourists are not the only people who come into this state to visit these cemeteries, there are vault owners who live outside of

Louisiana who come to visit and maintain the graves of their loved ones. Forcing these owners to relocate will no doubt result in their relocating in their own state.

To affirm the decision of the Court below will be to endorse abuse of the discovery process. The decision below creates a trap. Although relevant evidence is discovered at a hearing, the decision below dictates that a party initiate a blunderbust approach to discovery. To wait until that evidence is available for analysis to aid in directing discovery toward pertinent issues is grounds for dismissal or summary judgment.

Petitioners have been exceedingly diligent in initiation of the litigation and in seeking a prompt hearing date for the Temporary Restraining Order.

In that six weeks period, Petitioners took reasonable action. They voluntarily dismissed the City of New Orleans, as the TRO hearing showed, that party gullible but not culpable. They asked for a continuance until the transcript and exhibits were available. And they tried, in vain, to obtain a copy of the transcript and exhibits.

Please see Investment Properties International, LTD. v. IOS LTD, 459 F.2d 705 (2rd Cir. 1972). [Vacating order limiting discovery

on jurisdictional issues where the jurisdictional facts were still unknown].

II. A conflict exists between the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit as to whether dismissals shall be granted in complex antitrust suits prior to giving plaintiff full opportunity for discovery.

This Court has several times made clear that a rigorous standard is to be applied in deciding to dismiss a suit before ample opportunity for discovery is afforded to plaintiff, this is especially true when the case involves complex antitrust matters.

In the recent case of Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746-747, (1976), the District Court dismissed the plaintiff's amended complaint on the pleadings, finding that the plaintiff had not alleged a sufficient nexus between the alleged violations of the Sherman Act and interstate commerce.

In reversing, this Court stated:

> "We have held that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted). And in antitrust cases, where the proof is largely in the hands of the alleged conspirators, Poller v.

> Columbia Broadcasting System Inc., 368 U.S. 464, 473 (1962), dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. Applying this concededly rigorous standard, we conclude that the instant case is not one in which dismissal should have been granted."

In Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969), the Supreme Court, in a per curiam opinion, reversed a lower court's summary judgment on an antitrustt case. There, contrary to the present case, extensive pretrial discovery had been allowed, showing that the plaintiff had not been allowed to install his bronze grave markers in the cemeteries. A separate installation fee was charged for the installation of the plaintiff's markers. As here, fees were exorbitant when compared to the actual cost of installation. A specific alloy content for the bronze markers was demanded by the cemetery, which was coincidentally the same as that contained in the markers made by the defendant. There were even attempts to dissuade low income owners from purchasing markers from the plaintiff.

Your Honors stated that no written evidence of a conspiracy was necessary, and that business behavior is admissable evidence from which the fact finder could infer agreement.

While this Court expressed no opinion on the strength or weakness of petitioner's case, it was held that the alleged conspiracy had not been conclusively disproved and that material issues of fact remained which could only be resolved by a jury.

> "As we have cautioned before 'summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot' Poller v. Columbia Broadcasting System, 368 U.S. 464, 473."

In Hickman v. Taylor, 329 U.S. 495, 507, 67 S.Ct. 395 (1947), the Supreme Court said that the deposition discovery rules are to be accorded broad and liberal treatment and that mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.

> "The deposition discovery procedure simply advances the stages at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

As Your Honors stated in Schlangenhauf v. Holder, 379 U.S. 104 at 114, 85 S. Ct. 234 (1964):

> "We enter upon determination of this construction with the basic premises 'that the deposition-discovery rules are to be accorded a broad and liberal treatment, 'Hickman v. Taylor, supra, at 507 to effectuate their purpose that 'civil trials in the federal courts no

longer need be carried on the dark." Id., at 501

There was ample authority to have justified the granting of the Motion to Continue made at the hearing and the deferral of consideration of the Motion for Summary Judgment until plaintiffs had obtained discovery which applied directly on the issue raised by the motion, so the District Court and this Court could have ascertained what the real facts are. Cf. Umdenstock v. American Mortgage and Investment Co. of Oklahoma City, 495 F.2d 589 (10th Cir. 1974).

In fact situations such as the present involving antitrust issues the Court has consistently stressed the need for discovery before summary judgment is considered. Under the "conclusively disproved" test of Norfolk Monument, supra, this decision should be reversed. There was no evidence before the Court to prove or disprove the jurisdictional or conspiracy issues. In relying on the affidavit of Monsignor Wigmann the Court erred as there was evidence found at the TRO Hearing which contradicted his statements and thereby impugned his credibility. However, such evidence as was in the record was unavailable to the Dictrict Court at the time of its decision.

III. A conflict exists between the United States Courts of Appeals of the Tenth, Seventh and Second Circuits and the Fifth Circuit as to the

> requisite discovery to which plaintiffs in a Civil Rights case are entitled before summary judgment may be granted.

In Rich v. Martin Marietta Corporation, 522 F.2d 333 (10th Cir. 1975), the Court in reversing, stated that the Trial Court should have allowed full discovery of the facts as there was no other means of ascertaining the merit in plaintiff's allegation. It stated that: "To frustrate the search is a most unsatisfactory result in that it fosters suspicion." Id. at 343.

In Lavin v. Illinois High School Association, 527 F.2d 58 (7th Cir. 1975), the Court stated at page 61 that summary judgment should be used cautiously and all procedural requirements [fair opportunity to conduct discovery] should be given strict adherence when motivation of the defendant is in issue. See also Illinois State Employees Union v. Lewis, 473 F.2d 561, 565-66 (7th Cir. 1972) and Tankersley v. Albright, 514 F.2d 965, 953 n. 8 (7th Cir. 1972).

A complaint that the defendants had conspired with the New York police to arrest and detain plaintiff in violation of plaintiff's civil rights was dismissed on a Rule 12(b)(6) motion. The Second Circuit Court of Appeal, in a per curiam opinion in Weisman v. LeLandais, 532 F.2d 308 (2d Cir. 1976), reversed:

> "Affording the complaints the favorable conspectus to which they are entitled, our review persuades us that the District Court acted prematurely in dismissing these actions and thus denying both plaintiffs the opportunity to establish their claims under the Civil Rights Act and the court's diversity jurisdiction."

See also Egelston v. State University College at Geneseo, 535 F.2d 752 (2nd. Cir., 1976).

Thus, three circuits have made clear that in Civil Rights cases, where intent is the issue, the policy of the courts is to allow full discovery before considering dismissal. To follow another course, as the Fifth Circuit has done, may well make fair and knowledgable litigation in this area an illusion.

IV. A conflict exists between the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit as to the burden of proof which must be met by the party moving for summary judgment before such motion is granted in Civil Rights Cases and other cases

In Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598 (1970), this Court, in reversing a grant of summary judgment, stated that respondant as the moving party had the burden of showing the absence of a genuine

issue of any material fact and that the material it lodged must be viewed in a light most favorable to the opposing party.

The court went on to specify the elements necessary for recovery in a Sec. 1983 action.

> "The terms of Sec. 1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of the constitutional rights under color of any statute, regulations, custom, or usage of any state or Territory. This second element requires that at the plaintiff show that the defendant acted 'under color of law.'"

In the present case, the district judge held that the facts alleged by the plaintiffs failed to meet either of the above prerequisites. Yet close examination of the facts and the jurisprudence indicates that they are indeed met. The defendants acted under color of law by using or attempting to use the power and/or political influence of the Departments of Health and Safety and Permits of the City of New Orleans to conceal and/or further the highly specified acts complained of in the complaint. Furthermore, the defendants have acted under color of law by utilizing an official state office in order to further their

preconceived course of conduct: to deprive this class of its contractual rights in a continuing attempt to divest them of their property rights and much more.

After closure by the City Health Department, the Archdiocese issued a complaint to the City of New Orleans, averring that its own property was a health hazard and a dangerous condition. The City made a cursory inspection of the wall vaults and reported to the Archdiocese that the vaults should either be repaired or destroyed. The Archdiocese, having no intention to repair the vaults, was satisfied that it had succeeded in obtaining a state authority to back its plan. The Petitioners can and should be allowed to prove that the Respondents deprived them of their constitutional rights "under color of law." Once proper discovery is allowed the discriminatory animus and state action requirements will be met under the reasoning of Baldwin v. Morgan, 251 F.2d 780 (5th Cir. 1958):

> "...misuse of power possessed by virtue of state law and made possible only because the wrong-doer is clothed with authority of state law, is action, 'under color of state law' for purposes of the 14th amendment and the Civil Rights Act."

The other prerequisite in a 42 U.S.C. Sec.

1983 action is that the defendants have deprived the plaintiff of a right secured by the "Constitution and laws" of the United States. Adickes v. S.H. Kress & Co., supra.

The deprivation of property rights in a proper constitutional claim under the Civil Rights Act. Honensee v. Grier, 373 F. Supp. 1358, 1363 (M.D. Pa. 1974).

Your Honors have rejected the personal/-property rights dichotomy in an action seeking declaratory and injunctive relief pursuant to 42 U.S.C. Sec. 1983. In Lynch v. Household Finance Corporation, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972) the Court ruled that a deprivation of property violates an individual's civil rights.

The Archdiocese stated in its motion for summary judgment:

> "It is submitted that the Court should find, as a matter of law, any property rights which plaintiff may claim to possess, whether that be in the nature of a right of ownership or merely that of use of the property for burial purposes, must be subordinate to the reasonable regulation and control of these rights by reason of the police power of the State."

Respondents have taken it upon themselves to speak for the State, to act under the auspices of state authority and to attempt to use its police power for their own economic benefit. The intent of the Archdiocese is evident

in the letter from Rev. Msgr. Wegmann to petitioner, Gilbert Maury, in which Msgr. Wegmann summarily dismisses Mr. Maury's ideas on restoration of his property and explains their plans for the vault owners to buy new plots in Catholic cemeteries at their own cost, with no reimbursement for the property they have lost or, in the alternative, to disinter the remains of the families and ancestors of the plaintiffs and move them to a common grave, or in more euphemistic terms, as Msgr. Wegmann put it: They will be "interred with other remains (similarly gathered) in a single burial place . . . the site will have a marker but no names will be inscribed." (See Exhibit M-4).

Petitioners assert that there is an issue of material fact with regard to their claim under 42 U.S.C. 1983 and that the facts and allegations stated in the original complaint are sufficient to present a fact issue of a conspiracy.

Section 1985(3) covers conspiracies which are designed to deprive citizens of the equal enjoyment of rights secured to all citizens of the United States. Phillips v. Trello, 502 F.2d 1000 (3rd Cir. 1974). Both private conspiracies and those under the color of the law are made actionable under 1985(3). The Supreme Court stated in Griffin v.

Breckinridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338, (1971) that:

> "1985(3) does not require state action but reaches private conspiracies . . . that are aimed at invidiously discriminatory deprivation of the equal enjoyment of rights secured to all by law. . ." 403 U.S. at 88-89.

Therefore, even in the absence of color of law, the presence of a private conspiracy to deprive the plaintiffs of their civil rights would be covered by 1985(3).

However, the Court in Griffin emphasized that the purpose of 1985(3) is not to create a general federal tort law. The Court stressed the key prerequisite for bringing an action under 1985(3) when it stated:

> "The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by all." 403 U.S. at 102, 91 S.Ct. at 1798 (footnotes ommitted).

As the plaintiffs in Griffin were blacks who claimed they were subject to racial deprivation of rights, the Court did not reach the issue of "whether a conspiracy motivated by invidiously discriminatory intent other

than racial bias would be actionable under Sec. 1985(3)." 403 U.S. at 102 n.9, 915 S.Ct. 1790.

Several appellate court decisions, however, have held since Griffin that an action can be brought under Sec. 1985(3) to reach conspiracies motivated by a class based discriminatory intent which is other than racial. The Court in Cameron v. Brooks, 473 F.2d 608, 610 (6th Cir. 1973), stated:

> "We hold that 1985(3)'s protection reaches clearly defined classes. . . If a plaintiff can show that he was denied the protection of the law because of the class of which he was a member, he has an actionable claim under 1985(3)."

By refusing to consider other than racial discrimination, the Fifth Circuit is in conflict with the Sixth on Sec. 1985(3).

There is no reason that this same reasoning should not be applied to Sec. 1982. However, based on no evidence the Fifth Circuit ruled there was no racially based motive for discrimination and also did not address the issue of discrimination based on grounds other than race.

The wall vault owners are mostly black families with low income. The wall vaults were designed for the purpose of making burial places affordable for the poor and still maintaining the dignity of having their own burial

property. The Respondents have not attempted to condemn any large individual tombs which are owned by wealthier families and who are for the most part white families, nor could they do so. The poor are obviously a more vulnerable target for the Archdiocese and Acme to exploit.

Petitioners should be allowed to prove there was a conspiracy within the meaning of Sec. 1985(3), that such conspiracy was for the purpose of depriving this class of the equal protection of the laws, that the conspirators acted in furtherance of their conspiracy, and that the Petitioners suffered injury to their persons and property.

The Court below held that for claims under 42 U.S.C. Sec. 1981, state action was required. Your Honors conclusively laid this issue to rest in Jones v. Alfred H. Meyer Co. 392 U.S. 409, 88 S. Ct. 2186 (1968) where it was held that 42 U.S.C. Sec. 1981 and 1982 were based on the Thirteenth Amendment, and so there was no state action requirement. Thus, the decision below must be reversed on this point.

V. A conflict exists between the United States Court of Appeals for the Sixth and Eighth Circuits and the Fifth Circuit as to whether amendment of the complaint shall be allowed before summary judgment is

granted.

The general policy of the courts is to allow amendment of the pleadings as long as there is no bad faith on the part of the plaintiff.

See 3 Moore's Federal Practice, 2d Ed. (1974) at p. 874-875.

Rule 15 of the Federal Rules of procedure states that amendments "shall be freely given when justice so requires." The Sixth Circuit in following these guidelines has said:

> "The proposition that a case heard in the federal courts should be determined upon the merits and after an adequate development of the facts is an established principle of this court." (Case remanded with directions to allow plaintiff to amend). Oil, Chemical and Atomic Workers International Union v. Delta Refining Co., 277 F.2d 694 (6th Cir. 1960).

In another case the same Court said:

> "The Court should be liberal in allowing amendments where no prejudice will result to the adverse party and in order to present the true facts to the court. McDowall v. Orr Felt & Blanket Co., 146 F.2d 136 (6th Cir. 1944).

The position of the Sixth Circuit is, therefore, more consistent with the policy expressed in the Federal Rules. The Fifth Circuit erred by issuing a premature summary judgment before discovery or amendment.

The Eighth Circuit has been no less

adamant. In McIndoo v. Burnett, 494 F.2d 1311 (8th Cir. 1974) the Court recognized that pleadings are merely to facilitate a proper decision on the merits. See also Willburn v. Pepsi Cola Bottling Co., 492 F.2d 1288 (8th Cir. 1974).

More recently the same court made it clear that there must be prejudice to the party opposing the motion to amend, if that motion is to be denied.

> "The burden is on the party opposing the amendment to show...prejudice. In ruling on a motion for leave to amend, the trial court must inquire into the issue of prejudice to the opposing party, in light of the particular facts of the case." [emphasis added] Beeck v. Aquaslide'n Dive Corp., 562 F. 2d 537 (8th Cir. 1977)

There was no showing of prejudice to the Respondents in the present case as in fact there was none. The District Court arbitrarily denied petitioner's motion to amend disregarding the policy of the Federal Rules and the majority of courts.

VI. A conflict exists between the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit as to whether amendment of the complaint shall be allowed before summary judgment is granted.

This Honorable Court interpreted Rule

15(a) in Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962). There the Court said:

> "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded ... In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require be freely given.

Petitioner contends that the Court of Appeals, contrary to the rules and the mandate of the Supreme Court, upheld the denial of leave to amend and that this constitutes reversible error.

VII. The decision of the court below is contrary to the long established policy and jurisprudence that dismissal and summary judgment cannot be justified by a mere six week delay.

The Court of Appeals justified dismissal and summary judgment prior to discovery on the ground that petitioners had not initiated discovery proceedings in the six weeks prior to the October 20, 1976 hearing. However, the Court did not note that material from the TRO

Hearing, on which discovery should have been based, and which supported petitioners' allegations, was not in the record and was unavailable to either the Court or petitioners.

Even without the denial of leave to amend, unavailability of the transcript and exhibits, and denial of the motion to continue, a mere six week delay is not grounds for the ultimate sanction of dismissal. In fact, it does not even support such a decision.

Dismissal is addressed primarily in Rules 12, 37 and 41 of the Federal Rules of Civil Procedure. Although petitioners have found no cases which base dismissal under Rule 12(b) for delay, other than the case cited by the Fifth Circuit, there are many cases addressing dismissal for delay under Rules 37 and 41. As the policies behind all three rules are the same on the issue of delay, the cases under Rules 37 and 41 are extremely important.

The case cited by the Fifth Circuit, Village Harbor, Inc. v. United States, 559 F. 2d 247 (5th Cir. 1977) is distinguishable in that the District Court had heard three and one-half days of testimony before it ruled. Thus, there may be some merit to the Court's conclusion that as plaintiff had two months to prepare for the summary judgment, and the hearing testimony was available, there was no

cause for not being prepared.

However, Village Harbor was a case of first impression. Thus, to bar discovery in the instant case where evidence from the prior hearing was not available is to extend the doctrine too far. In the instant case, petitioners had good cause not to be prepared--the Court and the reporter had not made the material available.

Rule 41(b) is relevant as it covers involuntary dismissal because of delay. One of the many ironies of this case is that had the dismissal been based on Rule 41(b), and not Rule 12(b), the matter of the six-week delay would not at all have supported the decision in the courts below.

In United States v. Inter-American Shipping Corp., 455 F.2d 938 (5th Cir. 1972), the Fifth Circuit held under Rule 41(b) that dismissal was an abuse of discretion where only six months had passed from filing of the complaint and the dismissal, and of that time only the last month was a period of unauthorized delay and the record revealed no contemptuous conduct. Please also see: Dynotherm Corp. v. Turbo Machine Co., 392 F.2d 146 (3rd Cir. 1968), [dismissal for want of prosecution and abuse of discretion in November of 1966 when there was no indication plaintiff had en-

gaged in dilatory tactics prior to May 1965].

Please see also Durham v. Flordia East Coast Railway Co., 385 F.2d 366 (5th Cir. 1967); Richman v. General Motors Corp., 437 F.2d 196 (1st Cir. 1971); and Gill v. Stowlow, 240 F.2d 669 (2nd Cir. 1957), [dismissal with prejudice only in face of a clear record of delay or serious wilful default].

Cf. Pond v. Braniff Airways, Inc., 453 F.2d 347 (5th Cir. 1972) [held that dismissal without prejudice was an abuse of discretion where the effect was to bar litigation on the merits due to running of statute of limitations and failure to file pre-trial order and proposed jury instructions due to counsel's inadvertence].

Please also note Gayda v. New Amsterdam Casualty Co., 415 F.2d 304 (3rd Cir. 1969) [dismissal improper when three-year delay due in part to fault to clerk of court] and Bendix Aviation Corp. v. Glass, 176 F. Supp. 374 (E.D. Pa., 1959) [seven-year delay no grounds for dismissal when delay due in part to fault of clerk of court].

Given this jurisprudence, it is strange that a mere six-week delay would support denying trial on the merits under Rule 12. Moreover, the decision below holds against petitioners the fact that they could not act on

this evidence, either by way of amending their pleading or in using it to show jurisdiction or to oppose summary judgment, when, due to delays by court employees in transcribing and filing, the transcript and exhibits were unavailable.

Under Rule 37, the policies behind dismissal for delay are the same as those for Rule 41. In National Hockey League v. Metropolitan Hockey Club ___U.S.___, 96 S. Ct. 2778 (1976), Your Honors upheld a dismissal for failure to answer interrogatories after many months of unexcused delay. Your Honors have also held that in order to justify dismissal under Rule 37, such delay in complying with discovery orders must be "wilful" Societe International Pour Participation Industrielles, et. Commercials v. Rogers, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1955 (1958).

It is incongruous, therefore, that under Rule 12, a minor delay not due to any wilful act of petitioners, other than to wait for court employees to type and file the TRO Hearing, should have such dire consequences for petitioners in such an important case. To wait for matters in the Court's record to be made available so that a party may proceed based on that record should not support dismissal or summary judgment. If this Court

allows the decision of the Fifth Circuit to stand, such will be the law.

This is especially tragic where, as here, summary judgment was based on affidavit (the "least trustworthy" form of evidence), Moore's Federal Practice, par. 56.11[3] and 56.15[4] (1974) vol. 6, Parts 1 and 2, at 229 et seq. and 511 et seq., whereas recorded testimony subjected to cross examination was in the record, but not considered (Moore's Federal Practice, par. 56.11[4] and 56.15[4], and that testimony demonstrated significant variations between various statements made by Msgr. Wegmann, the author of the affidavit.

CONCLUSION

Justice has yet to be done in this case. Should this petition be denied the wall vaults which have stood for 155 years will be gone, and gone with them irreplacable portions of the pride and heritage of our country. The owners of the vaults, the less affluent class which our forefathers considered and respected enough that they built these inexpensive burial places for their use, will have been evicted from their property without compensation and their deceased loved ones placed in common graves unknown and forgotten, without even being given a chance to present their side to a court of law. We pray to this Court

not to let this happen. For these reasons this writ of certiorari must be granted.

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CERTIFICATE

I hereby certify that a copy of the foregoing pleading has been served upon all interested counsel by placing a copy of the same in the United States Mail, postage prepaid and properly addressed, all on this 23d day of June, 1978.

_____
Louis R. Koerner, Jr.

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 76-4252
Summary Calendar

D. C. Docket No. CA 76-2661 E (H)

SAVE OUR CEMETERIES, INC., ET AL.,

Plaintiffs-Appellants,

versus

THE ARCHDIOCESE OF NEW ORLEANS, INC., ET AL.,

Defendants-Appellees.

*Appeal from the United States District Court for the*
Eastern District of Louisiana

Before THORNBERRY, RONEY and HILL, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

February 28, 1978

ISSUED AS MANDATE:

**SAVE OUR CEMETERIES, INC., et al., Plaintiffs-Appellants,**

**v.**

**The ARCHDIOCESE OF NEW ORLEANS, INC., et al., Defendants-Appellees.**

**No. 76-4252**
**Summary Calendar.***

United States Court of Appeals, Fifth Circuit.

Feb. 28, 1978.

Nonprofit organization and owner of wall vault in private cemetery brought antitrust and civil rights action against cemetery owners challenging the owners' intention to comply with a city notice that they should not permit future burials in the wall vaults due to the advance degree of deterioration of the wall. The United States District Court for the Eastern District of Louisiana, Fred J. Cassibry, J., dismissed and plaintiffs appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) absent evidence that the cemetery owners' action had a direct and substantial effect on interstate commerce, their actions could not violate the Sherman Act; (2) the cemetery was not liable under the Civil Rights Act of 1871 or the civil rights statute guaranteeing equal rights under the law, absent state action, and (3) absent racial or other class-based discriminatory animus, the cemetery owners were not liable under the civil rights statutes guaranteeing equal property rights and prohibiting conspiracies to deny equal protection.

Affirmed.

**1. Federal Courts ⇐33, 34**

When plaintiff's allegations of jurisdiction are challenged, plaintiff has burden of proving that jurisdiction exists and district court may consider matters outside pleadings.

**2. Monopolies ⇐12(1.7)**

Absent evidence that private, religious cemetery's actions had direct and substantial effect on interstate commerce, cemetery was not subject to liability under Sherman Act. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

**3. Federal Courts ⇐763**

Court of Appeals is not bound by label district court puts on its disposition of case.

**4. Federal Civil Procedure ⇐1742**

District court may dismiss for lack of subject matter jurisdiction only if federal claims are wholly insubstantial or frivolous.

**5. Federal Civil Procedure ⇐1742.1**

Where civil rights claims were not wholly insubstantial or frivolous on face of complaint, they would have been more appropriately dismissed for failure to state claim rather than for lack of subject matter jurisdiction.

**6. Federal Courts ⇐763**

District court's order could not be reviewed as dismissal for failure to state claim where district court considered matters outside pleadings, but Court of Appeals would treat district court's grant of motion to dismiss as grant of motion for summary judgment. Fed.

*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

Rules Civ.Proc. rules 12(b)(6), 56, 28 U.S. C.A.

7. Civil Rights ⇐13.5(2)

Finding of state action is necessary prerequisite to grant of relief pursuant to Civil Rights Act of 1871 and civil rights statute guaranteeing equal rights under the law. 42 U.S.C.A. §§ 1981, 1983.

8. Civil Rights ⇐13.5(2)

Where cemetery owners controlled, managed and operated cemetery as private, religious cemetery, entirely free from any contract, arrangement, or supervision by any public body, there was no state action and cemetery owners could not be held liable under Civil Rights Act of 1871 or civil rights statute guaranteeing equal rights under the law. 42 U.S.C.A. §§ 1981, 1983.

9. Civil Rights ⇐13.4(6)

Finding of class-based invidiously discriminatory animus is necessary prerequisite to grant of relief pursuant to civil rights statute guaranteeing property rights and statute prohibiting conspiracies to deny equal protection. 42 U.S. C.A. §§ 1982, 1985(3).

10. Civil Rights ⇐13.4(6)

Absent indication of racial or other class-based discriminatory animus in cemetery's complying with city notice to prohibit future burials in wall vaults, cemetery could not be held liable under civil rights statute guaranteeing property rights or under statute prohibiting conspiracies to deny equal protection. 42 U.S.C.A. §§ 1982, 1985.

11. Federal Civil Procedure ⇐1828

District court did not err in dismissing claims before plaintiffs completed discovery where plaintiffs had approximately six weeks to prepare for hearing on motion to dismiss, but had not even begun discovery.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, RONEY and HILL, Circuit Judges.

JAMES C. HILL, Circuit Judge.

The issue raised by this appeal is whether the district court properly dismissed the appellants' suit, in which the appellants charged violations of the Sherman Act and of the Civil Rights Act. After a careful review of the record, we hold that the district court properly dismissed the appellants' antitrust claims for lack of subject matter jurisdiction. We also hold that the district court's dismissal of the appellants' civil rights claims is properly reviewable as a grant of summary judgment, and, reviewed as such, we affirm the district court.

The appellants in the case on appeal are Save-Our-Cemeteries, Inc., a nonprofit organization, and Mr. Gilbert Maury, an alleged owner of a wall vault in St. Louis Cemetery No. 2 in the City of New Orleans. The appellees are the Roman Catholic Church of the Archdiocese of New Orleans and New Orleans Archdiocesan Cemeteries, Inc. In 1974, the New Orleans Department of Health advised the appellees that they should not permit future burials in the wall vaults in St. Louis Cemetery No. 2 due to the advanced degree of deterioration of the wall. When the appellees indicated their intention to comply with the Department of Health notice, the appellants brought this suit in the federal district court, charging violations of the Sherman Act, the Civil Rights Act, and the National Historic Preservation Act.

The appellees filed a motion for summary judgment and motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. After a hearing on these motions, the district court dismissed the appellants' complaint. The district court's order did not specify whether dismissal was for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure or for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6). The district court judge indicated at the hearing on the motions, however, that the basis for dismissal was lack of subject matter jurisdiction. On this appeal, the appellants challenge only the dismissal of their Sherman Act and Civil Rights Act claims.

[1, 2] The district court properly dismissed the appellants' Sherman Act claims. When a plaintiff's allegations of jurisdiction are challenged, the plaintiff has the burden of proving that jurisdiction exists, *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416, 418 (5th Cir. 1972), and the district court may consider matters outside the pleadings. *Village Harbor, Inc. v. United States*, 559 F.2d 247, 249 (5th Cir. 1977). In the case on appeal, the appellants' complaint merely states the conclusion that the appellees "are engaged in interstate commerce and/or in business affecting and involving interstate commerce" and are "causing an undue burden on interstate commerce." In support of their motion for summary judgment, the appellees submitted the affidavit of Rev. Monsignor Raymond Wegmann, Director of the New Orleans Archdiocesan Cemeteries, to the effect that the appellees were not involved in interstate commerce and that the appellees' actions did not have a direct and substantial effect on interstate commerce. *See Rosemound, supra* at 418–19, and cases cited therein; L. Sullivan, Handbook of the Law of Antitrust § 233, at 709–10 (1977). The appellants did not introduce any evidence at the hearing to indicate that the appellees' actions fell within the jurisdictional reach of the Sherman Act, although the appellants received notice of the appellees' motions approximately six weeks before the hearing on the motions. Because the appellants failed to carry their burden of proving the existence of subject matter jurisdiction, the district court properly dismissed the appellants' Sherman Act claims pursuant to Rule 12(b)(1). *Morgan v. Odem*, 552 F.2d 147, 149 (5th Cir. 1977).

[3–5] To review the district court's action with respect to the appellants' Civil Rights Act claims, it is first necessary to properly characterize the district court order. *See Village Harbor, Inc. v. United States*, 559 F.2d 247, 249 (5th Cir. 1977). A court of appeals is not bound by the label a district court puts on its disposition of a case. *Tuley v. Heyd*, 482 F.2d 590, 593 (5th Cir. 1973). A district court may dismiss for lack of subject matter jurisdiction only if the federal claims are "wholly insubstantial or frivolous." *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). In the case on appeal, the appellants alleged in their complaint that the appellees had violated § 1981, § 1982, § 1983, and § 1985(3) of the Civil Rights Act, 42 U.S.C. §§ 1981–1983, 1985(3). These claims were not wholly insubstantial or frivolous on the face of the complaint. Therefore, they would have been more appropriately dismissed for failure to state a claim rather than

for lack of subject matter jurisdiction. *Ramirez v. Yzaguirre*, 562 F.2d 1259 (5th Cir. filed Oct. 20, 1977).

[6] The district court's order may not be reviewed as a dismissal for failure to state a claim, however, because the district court considered matters outside the pleadings. The district court judge stated at the hearing on the motions that he had read everything the parties had put into the record, which included the affidavit submitted by the appellees. Additionally, during the hearing on the motions, the appellants' attorney discussed evidence presented in a previously conducted hearing for a temporary restraining order in the same case presently before this court. Therefore, pursuant to Fed.R.Civ.P. 12(b), this court must treat the district court's grant of the motion to dismiss as the grant of a motion for summary judgment. *Village Harbor Inc., v. United States*, 559 F.2d 247, 249 (5th Cir. 1977); *Brinkley & West, Inc. v. Foremost Insurance Co.*, 499 F.2d 928 (5th Cir. 1974); Fed.R. Civ.P. 12(b)(6), Advisory Committee Notes.

A motion for summary judgment may be granted if "there is no genuine issue as to any material fact and [if] the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Motions for summary judgment are designed to "pierce the allegations in the pleadings," thereby permitting the court to determine whether a factual basis actually exists for the petitioner's claims. *Tuley v. Heyd*, 482 F.2d 590, 593 (5th Cir. 1973); 10 C. Wright & A. Miller, Federal Practice and Procedure § 2712, at 373 (1973). Because the appellees supported their motion for summary judgment with a sufficient affidavit, the appellants had the burden to "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The appellants failed to meet this burden. Their argument at the hearing on the motions was limited to the unsubstantiated allegations they had made in their complaint and to certain insignificant evidence presented at the previous hearing for a temporary restraining order.

[7, 8] A finding of state action is a necessary prerequisite to a grant of relief pursuant to § 1981 and § 1983. *Morgan v. Odem*, 552 F.2d 147, 148 (5th Cir. 1977). To disprove the existence of any state action, Monsignor Wegmann swore in his affidavit that New Orleans Archdiocesan Cemeteries, Inc. "controls, manages and operates [St. Louis Cemetery No. 2] as a private, religious cemetery, entirely free from any contract, arrangement, or supervision by any public body. . . ." The Monsignor also swore that neither the New Orleans Archdiocesan Cemeteries nor the Archdiocese of New Orleans ever received any funds from any governmental body. The appellants did not dispute these statements. In fact, although appellants originally joined the City of New Orleans and various city officials as codefendants, the appellants voluntarily dismissed them because they "were acting within the course and scope of their administrative functions as city officials." Therefore, the appellants' § 1981 and § 1983 claims are appropriate for summary judgment.

[9, 10] A finding of a class-based invidiously discriminatory animus is a necessary prerequisite to a grant of relief pursuant to § 1982 and § 1985(3). *Washington v. Davis*, 426 U.S. 229, 238–48, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Morgan v. Odem*, 552 F.2d 147, 149 (5th Cir. 1977). The trial court found that the appellees were not racially motivated in

complying with the City's notice to prohibit future burials in the wall vaults. This court agrees with the district court. Therefore, summary judgment is appropriate for the appellants' § 1982 and § 1985(3) claims.

[11] The appellants argue that the district court should not have dismissed their claims because the appellants had not completed discovery before the hearing on the motions. The appellants had approximately six weeks to prepare for the hearing, and yet the appellants' attorney admitted at the hearing that he had not even begun discovery. Because the appellants made no showing of cause for their failure to begin discovery and because the appellants had sufficient time to do so before the hearing, we reject this argument. *Village Harbor, Inc. v. United States*, 559 F.2d 247, 249–50 (1977).

Although we hold that the appellants' antitrust claims appropriately were dismissed for lack of subject matter jurisdiction and that their civil rights claims are appropriate for summary judgment, we express no opinion as to any state causes of action.

AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

* * * * *

NO.77-1838

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SAVE OUR CEMETERIES, INC., ET AL.,
PETITIONERS

VERSUS

THE ARCHDIOCESE OF NEW ORLEANS,
INC., ET AL.,
RESPONDENTS

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

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## OPINIONS BELOW

The opinion of the District Court is unreported. The opinion of the Fifth Circuit Court of Appeals is reported at

568 F.2d. 1074.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Did the Circuit Court of Appeals err in affirming the trial court's granting of summary judgment as to plaintiffs' Sherman Act claims where plaintiffs failed to produce any countervailing evidence to defendants' affidavits and evidence in support of said motion?

2. Did the Circuit Court of Appeals err in affirming the trial court's granting of summary judgment as to plaintiffs' Civil Rights claims where plaintiffs' failed to allege or prove state action and/or any class-based invidiously discriminatory animus on the part of the defendants?



STATEMENT OF THE CASE

These proceedings were initiated on August 30, 1976, wherein plaintiffs sought declaratory and injunctive relief against the named defendants to the effect that the defendants would be enjoined from demolishing any existing "wall vaults" or crypts situated within St. Louis Cemetery No. 2.

Simultaneously with the filing of the original complaint, plaintiffs likewise sought a temporary restraining order, and, by agreement of counsel for all parties and the court, this matter was heard by the trial court with respect to the granting of a temporary restraining order on September 2, 1976.

The hearing for temporary restraining order consumed a full day of the court's time, and exhaustive testimony and documentation was produced by plaintiffs at

that hearing in support of their argument that irreparable injury would result to the plaintiff and the class of plaintiffs they sought to represent if the defendant, New Orleans Archdiocesan Cemeteries, was either ordered or permitted to demolish the wall vaults in St. Louis Cemetery No. 2.

Following the hearing on temporary restraining order, the court denied plaintiffs relief with a finding that there was no evidence introduced to indicate any immediate danger or irreparable injury to any party inasmuch as it was the uncontradicted testimony of all defendants that the Archdiocese was not, in fact, at any time in the immediate or foreseeable future making plans to demolish any of these wall vaults. Furthermore, it was the testimony of witnesses of the City of New Orleans



that they did not in fact, nor did they intend at any future time to issue any order of demolition for the particular structures in question, and that should either the Archdiocese or the City of New Orleans at some future date make a determination that such course of action was advisable or necessary, that certain legal steps would have to be taken at a state level under state law in order to determine the ownership of various vaults, persons who were interred therein, notification to such parties, etc. On the basis of such uncontradicted testimony, the court therefore, determined that plaintiffs were in no immediate dange of injury and injunctive relief was denied.

Four days following the court's ruling on injunctive relief, the defendants herein filed a Motion to Dismiss and Motion for

Summary Judgment on September 7, 1976.

Prior to that time, however, plaintiffs voluntarily dismissed the City of New Orleans and all of its agents or employees who had heretofore been named as defendants, alleging therein that it was shown "to the satisfaction of the plaintiffs that the defendant, City of New Orleans, and defendants, Robin and Thompson, were acting within the course and scope of their administrative functions as city officials and not in collaboration or in concert with the Archdiocese of New Orleans, Inc. and New Orleans Archdiocesan Cemeteries,...".

The court fixed defendant's Motions to Dismiss and for Summary Judgment to be heard on October 20, 1976 (almost six weeks from the date upon which these motions were filed and notice given of such filing to plaintiff's counsel.)



During the interim between the filing of these Motions for Summary Judgment and to Dismiss and the hearing, plaintiffs made no effort to initiate any discovery procedure with respect to the taking of depositions, submission of interrogatories, inspection of documents, etc., nor did plaintiffs file any countervailing affidavits or other evidence to contradict the supporting documents which were filed with the Motion for Summary Judgment.

At the hearing on October 20, 1976, plaintiffs likewise produced no further testimony or documentary evidence in support of their claim, other than what had originally been produced and filed in the hearing for temporary restraining order some six weeks previously.

Following the argument of counsel to the court, the court at that time rendered

its decision granting the defendants' Motion for Summary Judgment and dismissing plaintiffs' case, without prejudice.

ARGUMENT

1. THERE IS NO CONFLICT BETWEEN THE OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HEREIN AND OTHER DECISIONS OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, SECOND, THIRD OR NINTH CIRCUITS AS TO WHETHER SUMMARY JUDGMENT IS PROPER IN AN ANTI-TRUST CASE AS THE CASE AT BAR.

* * *

Petitioners cite various decisions of other Circuits to the effect that full discovery should be allowed prior to any dismissal of an anti-trust claim as being contrary to the decision herein. However, each of the cases thusly cited is readily distinguishable from the case at bar, and no conflict exists in relation thereto.



Petitioners cite the Second Circuit decision of Frey Ready-Mix Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551 (2d Cir. 1977) as being in conflict with this opinion.

That case was a complex anti-trust suit extending over five years of litigation. Two days prior to discovery cut-off, appellants made their first request for documents. Appellee objected and simultaneously moved for summary judgment, which was subsequently granted by the trial court.

In reversing, the Second Circuit found that the lack of adequate discovery was not the fault of the plaintiff, but rather the manner in which the trial court established discovery rules for the parties. The court observed:

> "...but here we do not have recalcitrant plaintiffs. Rather, we have plaintiffs who, partially through their own lack of prosecution but at least as much because of delays by the defendants and insufficient supervision by the court or

> magistrate were not able to begin discovery until 4½ years after they had initiated the suit, and then were not able to get a court ruling on defendants' objections to plaintiffs' first request for documents before summary judgment overtook them." (554 F.2d at p. 556)

Furthermore, the court cited, with approval, the decision of the Fifth Circuit in, Rosemound Sand and Gravel Co. v Lambert Sand and Gravel Co., 469 F.2d 416 (5th Cir. 1972) relied upon and cited by the Court in the instant opinion.

It is respectfully submitted that Rosemound, supra., is particularly apposite herein.

As in the instant case, Rosemound failed to avail himself of available discovery and other procedural remedies prior to granting defendant's motion to dismiss. Commenting on plaintiffs lack of diligence, the court found that:



> "The decision was delayed and Rosemound neither sought any other discovery nor proffered any further affidavits in support of the original motion. On this record we cannot say that Rosemound was foreclosed from submitting all of the jurisdictional facts to the court. The court's decision on the question of subject matter jurisdiction prior to trial was therefore not an abuse of discretion under Fed. R.Civ.P.12(d).:

and further:

> "the complaint contains only the barest conclusory statements of jurisdiction and Rosemound has added little to shore up its initially weak position." (469 F.2d at p.418)

Similarly, in the instant case, the Court of Appeals found that:

> "Appellant had six (6) weeks within which to prepare for the hearing, and yet appellant's attorney admitted at the hearing that he had not even begun discovery. Because the appellants made no showing of cause for their failure to begin discovery, and because the appellants had sufficient time to do so before hearing, we reject this argument." 568 F.2d 1078.

The cited decisions of the other Circuit Courts of Appeals are likewise distinguishable on the facts as being inappo-

site hereto and no way conflicting.

Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3rd Cir. 1978) involved a reversal of a dismissal on a finding that the trial court had erred in granting motion to dismiss on the face of the pleadings since the court had made a finding that "factual discovery was irrelevant." The trial court erroneously had concluded that plaintiff must have alleged the existence of "an agreement", and the absence of such allegation was, standing alone, sufficient for dismissal.

Petitioners cite Costlow v. U.S., 552 F.2d 560, as being contrary to the holding herein. However, in Costlow, supra., a Federal Tort Claims action, the plaintiff was effectively deprived of the benefit of answers to interrogatories previously propounded to the government and



found to be essential to establishing a valid cause of action properly alleged in the complaint.

The Ninth Circuit opinion in, Moore v. Mathews & Co., 473 F.2d 328 (9th Cir. 1973) involved the reversal of the trial court's granting of summary judgment after the commencement of a trial by jury at the completion of exhaustive pre-trial discovery. The court therein merely found that the pleadings and evidence already in the record raised substantial issues of fact for the jury, and summary judgment at that stage of the proceedings was inappropriate.

2. THERE IS NO CONFLICT BETWEEN THE OPINIONS OF THIS HONORABLE COURT AND THE OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT AS TO WHETHER SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS WAS PROPER IN AN ANTI-TRUST CASE SUCH AS THE

ONE HEREIN PRESENTED FOR REVIEW.

* * *

Petitioners cite this Court's opinion in, Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 48 L.ed 2d 338 (1976) as a contrary holding to the decision herein.

That case involved Sherman Act (15 U.S.C., Sec. 1-2) issues wherein plaintiffs alleged monopolistic practices in the providing of hospital services in the Raleigh, N.C. area.

The Fourth Circuit Court of Appeals affirmed dismissal of the complaint on a finding that there was no showing that the business involved was other than "local", nor did plaintiffs allege any substantial effect on interstate commerce.

This Court was constrained to reverse that holding in the light of the allegations of the complaint which, inter alia, alleged that 80% of the hospital's



purchases, a substantial number of its patients, and revenue from insurance companies all come from outside the state of North Carolina.

No such allegations were made or substantially urged herein. As the Fifth Circuit herein observed:

> "In the case on appeal, the appellants' complaint merely states the conclusions that the appellees "are engaged in interstate commerce and/or in business affecting and involving interstate commerce" and are "causing an undue burden on interstate commerce."
>
> "The appellants did not introduce any evidence at the hearing to indicate that the appellees' actions fell within the jurisdictional reach of the Sherman Act, although the appellants received notice of the appellees' motions approximately six weeks before the hearing on the motions."

Petitioners further urge this court to find the decision herein in conflict with the opinion in, Norfolk Monument Co. Inc. v. Woodlawn Memorial Gardens, Inc.,

394 U.S. 700.

Although factually perhaps analogous, the posture of that litigation makes it totally inapposite.

This Court held therein that the trial court erred in granting summary judgment in the fact of extensive discovery and a voluminous fact record which clearly demonstrated material facts to be in dispute and which raised genuine issues for jury determination. In the instant case, no such record or disputed factual issues are present.

3. THERE IS NO CONFLICT BETWEEN THE OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HEREIN AND THE OPINIONS OF THE COURTS OF APPEALS OF THE TENTH, SEVENTH AND SECOND CIRCUITS AS TO WHETHER SUMMARY JUDGMENT IS PROPER IN A CIVIL RIGHTS CASE AS PRESENTED HEREIN FOR REVIEW.

* * *



None of the decisions cited by petitioners support their contention that they were unreasonably deprived of discovery opportunities under the circumstances of the case.

As the Court of Appeals herein observed, petitioners made no effort to obtain discovery or seek delay prior to the actual hearing on summary judgment. Further, the court found that petitioners had ample opportunity to initiate pre-trial discovery and were unable to offer the court any substantial argument to the effect that material or relevant facts were not before the court.

Those cases cited as being in conflict herewith are therefore all distinguishable on the facts, and in no manner conflicting with this opinion.

Lavin v. Ill. High School Athletic Assn, 527 F. 2d 58 (7th Cir. 1975), a

sex discrimination case, was reversed because the trial court did not afford plaintiff reasonable opportunity to file countervailing affidavits to motion for summary judgment.

In Weisman v. LeLandais, 532 F.2d 308 (2nd Cir. 1976) the Second Circuit, unlike the Fifth Circuit herein, found "as for the Civil Rights Act, sufficient facts are stated (in the complaint) to constitute state action" (532 F.2d at p. 311).

Similarly, that same Circuit Court, in Egelston v. State University College at Genesco, 535 F.2d 752 (2nd Cir. 1976) merely held that sufficient facts were alleged to avoid a motion to dismiss, but intimated that dismissal by Rule 56 summary judgment might have been appropriate.



Petitioners further argue that the holding herein is contrary to this Court's opinion in Adickes v. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598 (1970). This decision, however, clearly set forth the requirement that an essential element of any Sec. 1983 claim is not only a showing that defendants acted "under color of law", but also that there be a finding of "state action".

In the instant case, the court found no allegation or evidence supportive of either element.

Additionally, Petitioners argue that the decision is in conflict with this Court's decision in Griffin v. Breckinridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L. ed 2d 338 (1971) as that case developed the theory of "private conspiracies" in a Sec. 1985 (3) action.

The opinion of the Fifth Circuit herein is entirely consistent with that

opinion and subsequent decisions. As the court observed in Griffin, supra.,

> "The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by all."
> 403 U.S. at 102, 91 S. Ct. at 1798.

In that regard, the Court herein observed:

> "A finding of racial discrimination is a necessary prerequisite to a grant of relief pursuant to § 1981, § 1982 and § 1985(3). Village Harbor, Inc. v. United States, 559 F.2d 247, 249 (5th Cir. 1977); Morgan v. Odem, 552 F.2d 147, 149 (5th Cir. 1977); Campbell v. Gadsden County District School Board, 534 F.2d 650, 653-55 nn.8 and 9 (5th Cir. 1976)." 568 F.2d at p. 1078.

Petitioners, at p. 37 of their Petition for Writs herein, state:

> "The Court below held that for claims under 42 U.S.C. Sec. 1981, state action was required."

It is then argued, in support of this



application for review, that such holding is manifestly contrary to this Court's decision in Jones v. Meyer, 392 U.S. 409, 88 S. Ct. 2186 (1968).

Respondents respectfully suggest to the Court that it did not specifically reach that decision in Jones, supra., inasmuch as the Court had under consideration only a cause of action therein under 42 U.S.C. 1982, and the language of the opinion, although subsequently used by the courts in relation to 1981 cases, did not directly concern that statute.

Nevertheless, petitioners' argument in relation thereto can be summarily dispatched, for they have misread the opinion of the Fifth Circuit herein. The Court clearly did not hold as suggested. Rather, in affirming dismissal on the 1981

claims it held:

> "A finding of racial discrimination is a necessary prerequisite to a grant of relief pursuant to § 1981, § 1982 and § 1985(3). Village Harbor, Inc. v. United States, 559 F.2d 247, 249 (5th Cir. 1977); Morgan v. Odem, 552 F.2d 147, 149 (5th Cir. 1977); Campbell v. Gadsden County District School Board, 534 F.2d 650, 653-55 nn.8 and 9 (5th Cir. 1976)." (emphasis added) 568 F.2d 1078.

The reported decision, at 568 F.2d 1077, does address itself to the "state action" requirement for relief, but only as it relates to a 1983 action, not one under 1981. The Court therein observes:

> "A finding of state action is a necessary prerequisite to a grant of relief pursuant to § 1983. Morgan v. Odem, 552 F.2d 147, 148 (5th Cir. 1977)."

There is, therefore, no conflict with the holding herein and this Court's appreciation of state action requirements vis-a-vis 42 U.S.C. 1981, c.f. Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970).

4. THERE IS NO CONFLICT BETWEEN



THE OPINION HEREIN AND THE OPINIONS OF EITHER THIS COURT OR OF ANY OTHER CIRCUIT AS TO WHETHER THERE WAS AN ABUSE OF DISCRETION BY THE TRIAL COURT HEREIN IN FAILING TO PERMIT PETITIONERS TO AMEND THEIR COMPLAINT PRIOR TO DISMISSAL BY SUMMARY JUDGMENT.

* * *

Petitioners urged the Court to grant this writ on the assertion that the Fifth Circuit erred by affirming summary judgment when the trial court had not permitted petitioners to amend their complaint to set forth a cause of action.

It is submitted that all of the decisions cited in support of that proposition are inapposite herein. Firstly, the record of this case indicates that no

formal Motion to Amend was ever made to the Court, orally or by pleading. The only time at which that plea was made to the Court was during oral argument by Petitioners' counsel when, after the Court had announced its decision, counsel queried if he might have leave to amend on the basis of a transcript from the original TRO hearing.

Likewise, this issue was not seriously raised or argued to the Fifth Circuit and, therefore, was not properly before the Court for determination. Nevertheless, Rule 15, F.R.C.P. permits of amendment to pleadings, even after the granting of summary judgment and prior to appeal. Freeman v. Continental Gin Company, 381 F.2d 459 (5th Cir. 1967). However, amendment either prior or subsequent to summary judgment, should not be permitted where the Motion is dilatory



or there is no showing of merit. Petitioners failed to demonstrate any factual allegation or legal theory which had not been urged in the original complaint, which they could urge by amendment to state a claim upon which relief could be granted.

5. THERE IS NO CONFLICT BETWEEN THE OPINION HEREIN AND THE DECISIONS OF THIS COURT AND OTHER CIRCUITS AS TO THE AFFIRMATION OF DISMISSAL BY SUMMARY JUDGMENT ON THE BASIS OF THE FAILURE OF PETITIONERS TO INITIATE OR COMPLETE DISCOVERY.

* * *

Petitioners again misread the thrust of the Court's opinion herein in urging this Court to grant writs, in that the trial court erred in granting summary judgment when Petitioners had only six (6) weeks to prepare for hearing. All of

the decisions cited by Petitioners in support of that proposition concern dismissal under Rule 12 or 41 for failure or delay in prosecution of litigation. Petitioners therefore overlook the language of the opinion herein which held that this dismissal should be treated as the grant of a Motion for Summary Judgment. 568 F.2d, at p. 1077.

The Motion was therefore granted, not because of Petitioners failure to timely prosecute the matter, but rather, because of Petitioners failure to produce any evidence to countervail the evidence in support of Motion for Summary Judgment. The Court found, in answer to Petitioners' argument, that they had sufficient time to prepare by way of discovery, that no discovery had been in fact attempted and, more importantly, Petitioners had sufficient time to begin discovery or seek



continuance or other relief but likewise failed to act in that manner. 568 F.2d at p. 1078.

Finally, for the benefit of the Court, Respondents wish to call the Court's attention to the fact that Petitioners have attached a copy of the slip opinion of the Fifth Circuit in this case to their petition for Writ of Certiorari, rather than a copy of the officially reported decision of the Court as appears at page 1074 of Volume 568 of the Federal Reporter, Second Series. It is noted by Respondents, for the benefit of the Court, that significant changes were made by the Fifth Circuit in the language of that opinion subsequent to the printing and distribution of the official opinion in the Federal Reporter and, therefore, the Court should be guided in its considera-

tion of this petition by the language of the opinion as it appears in the official reports, rather than as set forth in the slip opinion attached to the petition filed herein.

CONCLUSION

For the foregoing reasons, the petition for Certiorari sought herein should be denied.

Respectfully submitted:

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August 7, 1978
DATE

BY _____
THOMAS A. RAYER

CERTIFICATE

I hereby certify that I have served a copy of the above and foregoing brief in opposition to Petition for Writ of Certiorari on opposing counsel, Louis R. Koerner, Jr., by depositing a copy of same postage prepaid to him on this 25th day of July, 1978 at 730 Camp St. New Orleans, La. 70130.

_____
THOMAS A. RAYER